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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 251.

ISSAC SIMS, JR.,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR RESPONDENT.

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OPINIONS BELOW.

The opinion of the Supreme Court of Georgia under review (R. 328) is reported as **Sims v. State**, 221 Ga. 190, 144 S. E. 2d 103 (1965), cert. granted, 384 U. S. 998, 16 L. Ed. 2d 1013 (1966). Prior decision of the Supreme Court of Georgia setting aside the first conviction on habeas corpus, is reported as **Sims v. Balkcom, Warden**, 220 Ga. 7, 136 S. E. 2d 766 (1964).

JURISDICTION.

Jurisdiction is invoked under 28 USCA, Sec. 1257 (3).

QUESTIONS PRESENTED.

In granting certiorari, the order of this Court declared that the writ was granted, limited to five questions as stated by the petition, as follows:

"1. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently coercive circumstances within the doctrine of **Fikes v. Alabama**, 352 U. S. 191.

"2. Whether petitioner's Fourteenth Amendment rights were violated by the failure of the Georgia courts to afford a fair and reliable procedure for determining the voluntariness of his alleged coerced confession in disregard of the principle of **Jackson v. Denno**, 378 U. S. 368.

"3. Whether petitioner's Fourteenth Amendment right to counsel as declared in **Escobedo v. Illinois**, 378 U. S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

"4. Is a conviction constitutional where:

(a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;

(b) the number of Negroes chosen is only 5% of the jurors but they comprise about 20% of the taxpayers; and

(c) a Negro criminal defendant's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years is disallowed.

"5. Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?"[1] (R. 356).

Respondent obviously does not concur in the form in which the questions are stated. The contentions of Respondent are fully set out in the "Summary of Argument," infra.

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[1] Petitioner has expressly abandoned this point in his brief (p. 3). Respondent does not agree with the assertion, however, that this question can be raised at a later date. This Court granted certiorari to hear it, and the abandonment of it here constitutes a waiver and "deliberate by-passing" of an existing remedy. See **Fay v. Noia**, 372 U. S. 391, 438, 9 L. Ed. 2d 837 (1963).

STATEMENT.

Issac Sims, a 29 year old Negro, was convicted at the 1963 October Term of the Superior Court of Charlton County, of the rape of a white woman, and sentenced to death (R. 251). His Court-appointed attorney declined to file an appeal to the Supreme Court of Georgia, and while awaiting execution at the Georgia State Prison, habeas corpus was instituted in the City Court of Reidsville, asserting as grounds therefor, denial of counsel, racial discrimination in the selection of the grand and petit juries, and the claim that imposition of the death penalty for rape was violative of the Fourteenth Amendment for several reasons. The trial court remanded the prisoner, but on appeal, the Supreme Court of Georgia held that jury discrimination could not be raised by habeas corpus; rejected the contention that imposition of the death penalty was unconstitutional for any reason; but set aside the conviction on the grounds that the failure of counsel to appeal, and the failure of the trial court to appoint other counsel, constituted a denial of counsel under both the state and federal constitutions. **Sims v. Balkcom, Warden,** 220 Ga. 7, 136 S. E. 2d 766 (1964).

Following remand, the jury boxes were revised (R. 76), petitioner was reindicted at the 1964 October Term (R. 1), tried and again sentenced to death (R. 316). Motion for new trial was filed (R. 22), later amended (R. 24), overruled (R. 317), and appeal was then taken to the Supreme Court of Georgia (R. 318). The conviction was affirmed by that Court. **Sims v. State,** 221 Ga. 190, 144 S. E. 2d 103 (1965) (R. 328). This Court granted certiorari on June 20, 1966 (R. 356), limited to 5 questions.[2] **Sims v. Georgia,** 384 U. S. 998, 16 L. Ed. 2d 1013 (1966).

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[2] See "Questions Presented", supra.

The facts material to an understanding of the issues are as follows: On April 13, 1963, at approximately 10 o'clock A. M., the victim, a 29 year old white woman (R. 157), was proceeding toward her home on a dirt road approximately 3 miles from St. George, Georgia, when petitioner in a following vehicle suddenly rammed her car from the rear, knocking it in the ditch and turning it completely around (R. 151). Petitioner emerged from his vehicle, forced the victim into the woods where she was choked, struck in the face, and forcibly raped (R. 152). When first seen following the crime, her face was streaming blood (R. 159) and her eyes, nose, and mouth were bleeding (R. 161, 187). As also stated by the examining physician,

> "When I saw her she was lying on the emergency room table, very emotionally upset and almost in a state of shock from the experience that she said she had just gone through. Her clothes were dirty that she had on; her face was dirty; there was mud about her legs; and her face had blood stains, had bruise marks, and there was clotted blood about, particularly her nose, and the eyes were bloodshot. There were marks on her neck, chest, and breast, and there were marks on her lower abdomen, and her female parts showed evidence of fresh trauma. There was a bleeding area and a small torn area in the lower part" (R. 153).

Petitioner left the scene on foot in the direction of the Toledo community (R. 153) and while police officers were tracking with bloodhounds at the scene (R. 180) a local citizen contacted his Negro employees at Toledo and instructed them to be on the lookout for any strange man (R. 163). Around 2:30 P. M. that afternoon, two of these Negro employees, T. W. Walker and Arthur Lee Walker, spotted petitioner at the Toledo community with mud on his clothes (R. 170). Upon approaching petitioner,

Arthur advised petitioner that the "law" was looking for him, after which the following ensued:

> ". . . and I asked him did he really attack that white woman.
>
> Q. You asked him what?
>
> A. Did he attack that white woman.
>
> Q. And what did he say?
>
> A. He said he did.
>
> Q. Did anybody tell him to make a statement?
>
> A. No, sir.
>
> Q. And you asked him what, now?
>
> A. I asked him did he attack that white woman, and he said 'yes'. And at that time he took off and took a little trot towards the swamp down there, and I backed up to the window and asked Boy Roberson for his gun, and I called him, and he turned and come back to me, and he got just about to me and I throwed the gun on him and told him to go and sit on T. W.'s porch . . ." (R. 176-7).

This admission, it should be noted, was admitted without objection.

Petitioner was picked up by the Walkers' employer around 3:30 P. M. (R. 164), and turned over to two state patrolmen (R. 184) who took him to Dr. Jackson's office in Folkston where his clothes were removed for evidence (R. 185). Following this, petitioner was removed to the Ware County jail in Waycross, Georgia (R. 185), around 5 or 6 o'clock (R. 133). Around 6:30 that same afternoon, petitioner recognized Deputy Dudley Jones at the jail whom he had known as a deputy sheriff in Charlton County, and called to him. A conversation ensued in which petitioner stated that he had "got in trouble with a white woman" and wished to make a statement to the sheriff (R. 209-210). Deputy Jones contacted Sheriff Lee, and around 10:30 that same night, Sims was brought

downstairs to the interview room where his statement (R. 226) was written out, read to him and signed by him, the entire proceeding taking only 20 to 30 minutes (R. 104, 119, 212). Sheriff Lee testified that he advised Sims that he was entitled to an attorney and that any statement could be used against him in Court (R. 97, 99, 224). Petitioner stated that he did not desire an attorney (R. 100, 120, 224). Petitioner Sims testified under oath that he remembers the statement being read to him (R. 136); that all the officers talked "nice" to him in the interview room (R. 139); that nobody threatened him (R. 140); that he recalls the sheriff telling him that anything he said could be used against him (R. 140); that Deputy Jones was "friendly" to him and he wasn't scared (R. 141-2); that nobody beat or threatened him (R. 142); that he considered Deputy Jones his friend (R. 143); that he signed the statement after it was read to him (R. 141); and that he signed it because it was "right" (R. 141).

At his second trial, petitioner was represented by a Negro attorney active in civil rights litigation who filed plea in abatement to the indictment based upon a claim of jury discrimination (R. 3); a challenge to the array of petit jurors for like reason (R. 6); motion for change of venue (R. 9); motion to suppress the confession made in the Ware County jail (R. 13); a plea in abatement attacking the Georgia rape statute, Code Sec. 26-1302, facially and as applied (R. 17); and an oral motion to quash. All of these motions were denied (R. 5, 8, 12, 16, 18, 146). As it will be necessary to refer at length to the evidence relative to several of these motions in the Argument, further reference will not be made here. The trial commenced on October 7, and was concluded on October 8, resulting in a verdict of guilty without recommendation of mercy (R. 2). Motion for new trial was filed in the usual "skeleton" form (R. 22). In due course, it was amended so as to assign error on the admission of the

confession and call in question the Georgia procedure of submitting the issue to the jury (R. 24). The motion was overruled (R. 317). Appeal was thereupon taken to the Supreme Court of Georgia by bill of exceptions which additionally assigned error on the orders overruling the several pleas and motions previously referred to (R. 318). The Supreme Court of Georgia affirmed (R. 328). This Court granted certiorari (R. 356).

SUMMARY OF ARGUMENT.

I.

Admission in evidence of the confessions obtained from petitioner while in custody violated none of his rights.

(A) Prior to trial, a full scale hearing was held by the Court on Petitioner's motion to suppress the confessions, which complied with the requirements of **Jackson v. Denno**, 378 U. S. 368, 12 L. Ed. 2d 908 (1964). The only thing which the trial court did not do that it might have done, was to read into the record explicit findings of fact. Cf. **Boles v. Stevenson**, 379 U. S. 43, 13 L. Ed. 2d 109 (1964). However, any failure in the respect, even assuming it otherwise deficient, is immaterial here, since (1) Counsel for petitioner expressly waived any further effort on the part of the Court to comply with **Jackson v. Denno**, and (2) Petitioner himself having testified under oath at the trial that he signed the confession, that he was not afraid, and that it was "right", demanded a finding that the confessions were voluntary, as the Supreme Court of Georgia so held (R. 329).

(B) The standards applied by the trial court in its charge to determine voluntariness (in effect, Code, § 38-411) do not fall short of that required by decisions of this Court. The sufficiency of instructions in this regard is not a matter of federal concern. **Lyons v. Oklahoma**, 322 U. S. 596, 601, 88 L. Ed. 1481 (1944).

(C) The confession was not obtained under inherently coercive circumstances. Petitioner was taken into custody around 3 o'clock on Saturday afternoon. Just prior thereto, before being arrested, he had spontaneously exclaimed to Negro turpentine workers that he had "attacked that white woman" (R. 176). He was placed in

jail between 5 and 6 o'clock P. M., and around 6:30, upon seeing a deputy sheriff whom he had known for many years, called to the deputy and in the course of a casual conversation, stated that he had raped a white woman, and that he wished to make a statement to the sheriff (R. 210). Around 10:30 that same evening he was brought downstairs in the jail where the statement was made, after being advised fully of his rights, the entire conversation taking 15 to 30 minutes. Petitioner's claim that he was earlier subjected to physical abuse while being examined in a doctor's office prior to being put in jail are disputed by the evidence, and in any event, no causal relation is shown between what took place in the doctor's office that afternoon and the confessions made later that night in the jail, in the presence of entirely different persons.

(D) Since petitioner expressly stated that he did not desire counsel after being fully advised of his rights, use of the confessions later obtained does not violate the rule of **Escobedo v. Illinois**, 378 U. S. 478, 12 L. Ed. 2d 977 (1964).

II.

Discrimination in jury selection does not appear from the record.

(A) No error is shown from the action of the Georgia Courts in restricting proof to the current jury lists, since it appears that the lists had just been revised, and Negroes were then serving on juries in Charlton County. In any event, (1) The offer of proof was not sufficient; (2) The evidence was sufficient to overcome any prima facie case which such evidence otherwise might have established.

(B) Use of the county tax digest in making up the jury lists is not unconstitutional because of the fact that the digest is required by law to be separated according to race. The digest is used in making up the jury boxes,

not the panels. As to the former, the decisions of this Court require that jury commissioners apprise themselves of the racial identity of those eligible for service, in order to insure that discrimination does not result. This process is deliberative. **Avery v. Georgia,** 345 U. S. 559, 97 L. Ed. 1244 (1953), on the other hand, involves the making up of the panels for each term of court, and the selection process at this stage is designed to be by chance, without regard to the identity of individual jurors. The legislative history of the state law attacked here (repealed in 1966) shows that it was not designed as an instrument of discrimination, but was motivated by a desire to facilitate identification in registration made difficult by previous practice whereby Negroes were entered on the tax digest under the names of their employers.

(C) There was no prima facie showing of discrimination from the fact that Negroes constitute 20% of the taxpayers, and a lesser percentage of jurors. **Swain v. Alabama,** 380 U. S. 202, 13 L. Ed. 2d 759 (1965); **Brown v. Allen,** 344 U. S. 443, 97 L. Ed. 469 (1953).

ARGUMENT.

I.

No Rights of Petitioner Were Violated by Admission in Evidence of the Confessions.

Petitioner contends that admission of the confessions in evidence at the trial were violative of his rights for four reasons. Respondent will consider these contentions in the same order urged by petitioner.

A. The Decision Below Is Not in Conflict With Jackson v. Denno.

It is the position of Respondent that the rule of **Jackson v. Denno**, 378 U. S. 368, 12 L. Ed. 2d 908 (1964), was not violated by the state courts because (1) The procedure followed below complied with the requirements of that decision, (2) Counsel for petitioner during trial expressly waived any further proceedings by the court to comply with the rule, and (3) Under the undisputed facts, there was no issue for determination, petitioner's own testimony demanding a finding of voluntariness.

First, as to the procedure employed by the Court, it is to be observed that prior to trial, counsel for petitioner filed a "motion to suppress illegally obtained evidence" (R. 13-16) which sought to suppress the written confession. A full scale hearing was had on this motion before the trial began outside the presence of the jurors (R. 47). At this hearing, the sheriff and deputy sheriff who were present when the confession was made testified at length, as well as petitioner himself (R. 96-145). At the conclusion, the motion was overruled (R. 147, 16).

Prior to the decision of this Court in **Jackson v. Denno**, supra, Georgia was one of the states which followed the New York rule, as this Court noted (378 U. S. at 396),

As stated in **Downs v. State**, 208 Ga. 619, 621, 68 S. E. 2d 568 (1952),

> "The State having made out a prima facie case that the alleged confession was freely and voluntarily made, it was a question for the jury to determine on conflicting evidence whether the alleged confession was freely and voluntarily made."

While it was early suggested that the preliminary hearing should be held outside the presence of the jury, **Hall v. State**, 65 Ga. 36 (1880), in practice this rarely has been done in the past, cf. **United States v. Carnignan**, 342 U. S. 36, 38, 96 L. Ed. 48 (1951), and note, 49 Minn. L. R. 360, 363 (1964), it was done here. In addition, when the matter of the confession came up during trial before the jury, the latter was excused while Sheriff Lee was subjected to cross-examination before the confession was admitted (R. 225), but counsel for petitioner then withdrew his request (R. 226). The Court also submitted the issue of voluntariness to the jury (R. 312), but this was necessary under state law. The Constitution of Georgia, Art. I, Sec. I, Par. V (Code Ann., § 2-105), guarantees every accused "a public and speedy trial by an impartial jury." See also, Constitution, Art. VI, Sec. XVI, Par. I (Code Ann., § 2-5101), declaring that "The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate . . ." This includes the right of the accused to have the issue as to the voluntariness of a confession ultimately decided by a jury. **Claybourn v. State**, 190 Ga. 861, 869, 11 S. E. 2d 23 (1940). To comply with this Court's decision in the **Denno** case, the issue must now be independently resolved by the trial judge, but in order to comply with the State Constitution, it must also be submitted to the jury. See Leverett, "Confessions and the Privilege Against Self-Incrimination," 1 Ga. St. B. J. 433, 441 (May, 1965), and cf. Siegel, "The Fallacies of Jackson v. Denno," 31 Brooklyn L. R. 50, 58

(1964); Note, 50 Iowa L. R. 909, 917 (1965). About the only thing which the trial judge might have done here which he did not do would have been to read into the record specific findings of fact so as to afford "a reliable and clear cut determination of the voluntariness of the confession." **Boles v. Stevenson**, 379 U. S. 43, 45, 13 L. Ed. 2d 109 (1964). However, as respondent will presently show, the evidence so far demanded a finding of voluntariness as to render this failure harmless. The Georgia procedure followed here was therefore tantamount to the Massachusetts rule, which this Court specifically approved in **Jackson v. Denno**, supra (378 U. S. at 378).

Second, any further effort toward compliance with **Jackson v. Denno** was expressly waived here. After the state had questioned Sheriff Lee as to the details of the confession, the following transpired:

> "The Defendant's Attorney: Your Honor, we'd like to have the opportunity to examine this witness before the statement is read into the record.
>
> The Court: All right.
>
> The Solicitor General: Would you like to do it at this time?
>
> The Defendant's Attorney: I believe the rule requires that the jury be excused.
>
> The Court: All right, let the jury go to the jury room.
>
> (The jury thereupon retired from the court room.)
>
> The Solicitor General: I was under the impression that he had already examined Sheriff Lee this morning concerning this statement, and that is a matter of record.
>
> The Court: All right.
>
> The Defendant's Attorney: As your Honor knows, the rule has been recently changed by the Supreme

Court of the United States, and we did have an opportunity to examine the witness today, and on that basis, your Honor, I withdraw my request that the jury be excused and let him proceed with the direct examination. I don't know whether the procedure being followed at this time satisfied the rule decided by the Supreme Court on June 22, 1964, that the Court must make judicial determination whether the statement was made voluntarily before it is read to the jury. We did make an examination today, and I withdraw the request for the jury to be excused.

The Court: All right, bring the jury back" (R. 225-6).

This clearly constitutes a waiver—a "deliberate bypassing" of any further or different procedural handling of the issue. **Fay v. Noia,** 372 U. S. 391, 438, 9 L. Ed. 2d 837 (1963). Insofar as it might be urged that petitioner did not himself participate in this decision, it is enough to say that this technical issue was of such nature that petitioner could not realistically comprehend it anyway. **Whitus v. Balkcom,** 333 F. 2d 496 (C. A. 5th, 1964), cert. den. 379 U. S. 931, 13 L. Ed. 2d 343 (1965).

Third, the evidence demanding a finding that the confession was voluntary, and any failure of the trial court to make an express finding to this effect was harmless. The Supreme Court of Georgia so held. See division 5 (c) of the syllabus to its decision (R. 329). The crime was committed around 10 o'clock A. M. on Saturday, April 3, 1963 (R. 150). At approximately 1 or 2 o'clock later that afternoon, petitioner appeared at the Toledo settlement, and before he was ever taken into custody, stated to several Negro turpentine workers that he had "attacked a white woman" (R. 176, 179). He was then placed under citizen's arrest by these Negro workers (R. 176), and handed over to the Georgia State Patrol around 3 o'clock

(R. 185). Petitioner was taken to Dr. Jackson's office where a physical examination was conducted which lasted 15 minutes (R. 207). He was then taken to the hospital where a cut over his eye was treated (R. 207), after which he was taken to the Ware County jail and confined some time between 5 and 6 P. M. (R. 133). Some time around 6:30, Deputy Dudley Jones happened to be putting a prisoner in the jail (R. 210), when petitioner, recognizing him as having been a deputy previously in Charlton County, called to Deputy Jones and told him that he, petitioner, had "got in trouble with a white woman" (R. 113, 138, 210). Upon being asked whether he wished to make a statement to the sheriff, petitioner replied that he did (R. 210). Petitioner admitted talking to Deputy Jones, and that he was treated "nice" and no effort was made to beat him or to "say anything" to him (R. 139). About 10:30 later that night, petitioner was brought downstairs in the interview room where the confession was made (R. 113, 210, 223). Petitioner testified under oath that the officers talked "nice" to him (R. 139); that he wasn't beaten or threatened (R. 139-142); that he wasn't afraid of Deputy Jones, who was "friendly" to him (R. 141-3); that he recalls the Sheriff telling him that anything he said could be used against him (R. 140); that he wasn't scared (R. 142); that the statement was read to him, and that he signed it because it was right (R. 141). It is also undisputed that the interrogation and taking of the statement took only about 15 to 30 minutes (R. 104, 119). Petitioner had not been taken before a judge, as it was Saturday evening and none was available (R. 236).

It is thus seen that petitioner confessed initially after having been in jail only an hour or so during a casual conversation, and that the written confession was given about 4 hours later, the latter lasting only 30 minutes at the most. There is not the slightest evidence that the confessions made in the Ware County jail were anything

but voluntary. To hold otherwise would require a rejection of petitioner's own sworn testimony at the trial. Where as here an accused admits at the trial that his confession was signed after it was read to him and because it was "right," there is no issue for judge or jury to determine. Viewed in the light of the previous, spontaneous confession to the Negro turpentine workers made before he was taken into custody (R. 176, 179), the record "suggests strongly that petitioner had concluded, quite independently of any duress by the police, that it was wise to make a clean breast of his guilt." **Stroble v. California,** 343 U. S. 181, 191, 96 L. Ed. 872 (1952).

B. **The Standards Applied Below to Determine Voluntariness Were Not Insufficient.**

This contention (Brief, p. 22) attacks the charge on voluntariness given to the trial jury (R. 312), which was in effect the provisions of Ga. Code, § 38-411, which declares:

> "Confessions must be voluntary.—To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury."

Under decisions of this Court dealing with confessions, "the accepted test is their voluntariness," **Gallegos v. Nebraska,** 342 U. S. 55, 65, 96 L. Ed. 86 (1957), which depends "upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." **Stein v. New York,** 346 U. S. 156, 185, 97 L. Ed. 1522 (1953); **Fikes v. Alabama,** 352 U. S. 191, 197, 2 L. Ed. 2d 246 (1957). "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." **Haynes v. Washington,** 373 U. S. 503, 513, 10 L. Ed. 2d 513 (1963). Ultimately, the test announced in the decisions of this

Court do not differ from that as stated by Georgia law and applied below. **Rogers v. Richmond**, 365 U. S. 534, 5 L. Ed. 2d 760 (1961), relied upon by petitioner, does not hold that any specific form of words must be used. It does not deal with what **must be considered** but rather with one thing which must **not** be considered, i. e., the probable reliability of the confession as one circumstance in determining its voluntariness. 365 U. S. at 542. This is a different proposition from the contention made here which was rejected by this Court in **Lyons v. Oklahoma**, 322 U. S. 596, 601, 88 L. Ed. 1481 (1944), where it was said:

> "The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process under the Fourteenth Amendment are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness."

C. The Confession Was Not Obtained Under Inherently Coercive Circumstances.

The confession here was given after petitioner had been in custody only 7 hours, and after a period of interrogation of only 30 minutes at the most. The case therefore differs from cases where an accused is subjected to persistent and repeated questioning over a period of several days, such as **Chambers v. Florida**, 309 U. S. 227, 84 L. Ed. 716 (1940); **White v. Texas**, 310 U. S. 530, 84 L. Ed. 1342 (1940); **Watts v. Indiana**, 338 U. S. 49, 93 L. Ed. 1801 (1949); **Harris v. South Carolina**, 338 U. S. 68, 93 L. Ed. 1815 (1949); **Johnson v. Pennsylvania**, 340 U. S. 881, 95 L. Ed. 640 (1950); **Culcombe v. Connecticut**, 367

U. S. 568, 6 L. Ed. 2d 1037 (1961); **Fikes v. Alabama,** 352 U. S. 191, 2 L. Ed. 2d 246 (1957). Nor is this a case where the accused was questioned for a long period without rest or sleep, as in **Ashcraft v. Tennessee,** 322 U. S. 143, 88 L. Ed. 1192 (1944). Nor was it a case where the accused was seen to have been suffering from a mental disorder, as in **Fikes v. Alabama,** supra; **Spano v. New York,** 360 U. S. 315, 3 L. Ed. 2d 1265 (1959); **Blackburn v. Alabama,** 361 U. S. 199, 4 L. Ed. 2d 242 (1960); **Reck v. Pate,** 367 U. S. 433, 6 L. Ed. 2d 948 (1961); **Culcombe v. Connecticut,** 367 U. S. 568, 6 L. Ed. 2d 1037 (1961). Nor is this a case where the accused was subjected to "trickery" in order to induce a confession, as in **Spano v. New York,** supra. There was no threat to bring in members of the accused's family and implicate them, as in **Culcombe v. Connecticut,** supra. There was no request and denial of counsel, as in **Haynes v. Washington,** 373 U. S. 503, 10 L. Ed. 2d 513 (1963). The undisputed evidence was that petitioner was advised that he was entitled to an attorney and that anything he said could be used against him (R. 97, 99, 120, 220, 224). Sims himself admitted he was advised that any statement he made could be used against him (R. 140). While the accused was stripped for purposes of examination, the entire undertaking took only 15 minutes (R. 207), and there was no instance of keeping the accused naked over a 5 or 6 hour period until he confessed, as in **Malinski v. New York,** 324 U. S. 401, 89 L. Ed. 1029 (1945). By petitioner's own sworn testimony, he was not threatened, he was not afraid, he was not beaten, and he signed the confession because it was "right" (R. 136-143). At the time the confession was signed, petitioner had not had supper, but he did not testify as to being hungry, only "I could have eat" (R. 136), and it appears he had been in jail only about 4 or 5 hours and had not been in custody long enough to be fed (R. 111). The arrest occurred around 3 P. M. on a Saturday afternoon (R. 137), when no judge was available for commitment hearing

(R. 236),[1] and hence it is not a case when a prisoner is held incommunicado without being carried before a magistrate.

The case of **Fikes v. Alabama**, supra, principally relied upon for the contention that the confessions were obtained under "inherently coercive circumstances," is completely inapposite. In that case, the accused was subjected to persistent questioning over the period of a week before he confessed; there was evidence of mental trouble; prompt commitment was denied; and efforts of the accused's father and an attorney to see him were rebuffed.

Nor are the confessions rendered inadmissible by any claim of alleged physical mistreatment. Petitioner testified that while in Dr. Jackson's office in Folkston, Dr. Jackson knocked him down, kicked him over the eye, and "drug" him over the floor by his privates (R. 131).

To begin with, Dr. Jackson denied that he knocked petitioner down or that he was beat while in his office (R. 204). For purposes of review, the Doctor's testimony in the respect must be accepted as true. **Haley v. Ohio**, supra (338 U. S. at 52): **Gallegos v. Nebraska**, supra (342 U. S. at 61); **Thomas v. Arizona**, 356 U. S. 390, 2 L. Ed. 2d 863 (1958).

It is undisputed that petitioner was treated for a cut over his eye at the hospital in Folkston (R. 204, 207), but

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[1] Code § 27-212 referred to in the brief of petitioner (p. 33) expressly recognizes that officers arresting without a warrant have a prescribed number of hours in which to carry the arrested person before an officer for hearing. Prior to the amendment of these two sections in 1956 (Ga. Laws 1956, p. 796), the requirement was not qualified by any stated number of hours. Here, however, the warrant for petitioner's arrest had been obtained (R. 239), and hence Code § 27-212 was not applicable, but rather Code § 27-210, which declares that the accused should be brought before a magistrate within 72 hours of arrest. Under Georgia law, capital offenses are bailable only before a judge of the superior court. Code § 27-901.

Dr. Jackson says he fell in the floor (R. 204). Dr. Jackson was extensively cross-examined by counsel for petitioner, but there was no effort to question him concerning the claims that he pulled petitioner by his privates (R. 197-208). No confession was elicited or attempted to be elicited at the doctor's office. The sole purpose of this examination was to ascertain whether there was any blood on petitioner or his pants, in view of the fact that the victim was seen to have been in her monthly period (R. 205). None of the officers or other persons who were present in the doctor's office were present at the jail when the confession was made. The petitioner was taken completely away from the scene of the doctor's office in Folkston, and carried 35 miles to the jail in Waycross, Georgia, before the matter of any confession was ever discussed. The written confession was not given until over 7 hours after the incident in the doctor's office, in entirely different surroundings, before entirely different persons, and without any connecting circumstances whatsoever.

Respondent specifically denies that any violence was committed on petitioner.[2] However, even assuming that petitioner was struck in the doctor's office, the decisions of this Court make plain that this fact alone would not bar use of confessions later obtained. **Lisenba v. California**, 314 U. S. 219, 235, 86 L. Ed. 166 (1941); **Lyons v. Oklahoma**, 322 U. S. 596, 602, 88 L. Ed. 1481 (1944); **Stroble v. California**, 343 U. S. 181, 191, 96 L. Ed. 872 (1952); **Thomas v. Arizona**, 356 U. S. 390, 2 L. Ed. 2d 863 (1958). Of course, any confession made "concurrently" with physical torture is thereby rendered inadmissible. **Stein v. New York**, 346 U. S. 156, 182, 97 L. Ed. 1522 (1953). "When this Court is asked to reverse

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[2] It should be noted that petitioner had been involved in a wreck just prior to the assault (R. 151) and the struggle between petitioner and the victim appeared to have been a violent one (R. 152, 159, 161, 187, 191).

a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise." **Stroble v. California,** supra. "Involuntary confessions, of course, may be given either simultaneously with or subsequent to unlawful pressure, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, **at the time he confesses,** is in possession of mental freedom to confess or deny a suspected participation in a crime," **Lyons v. Oklahoma,** supra.

In **Thomas v. Arizona,** supra, the prisoner was lassoed under threatening circumstances at the time of his arrest and again subsequently before being placed in jail. His confession made the following morning was held not invalidated by the experiences of the day previous, the Court declaring: "Deplorable as these ropings are to the spirit of a civilized administration of justice, the undisputed facts before us do not show that petitioner's oral statement was a product of fear engendered by them" (356 U. S. at 400).

In **Stroble v. California,** supra, the accused was arrested around noon and while being searched, the policeman kicked his foot to make him stand properly and then threatened the accused with a black jack. While awaiting for the police car to arrive, when asked whether he had committed the crime, accused mumbled something, whereupon a park foreman standing nearby slapped him. On the way to the jail, petitioner confessed. Upon arriving at the district attorney's office a short time later, he

again confessed in detail. Rejecting the contention that the previous violence vitiated the subsequent confessions, this Court declared:

> "Whatever occurred in the park at the foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise his statement to the officer while on the way to the district attorney's office was admittedly voluntary. In the District Attorney's office, petitioner answered questions readily; there was none of the pressure of unrelenting interrogation which this Court condemned in **Watts v. Indiana**. . . . His willingness to confess to the doctors who examined him, after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that petitioner had concluded, quite independently of any duress by the police, 'that it was wise to make a clean breast of his guilt' " (343 U. S. at 191).

In **Lyons v. Oklahoma**, supra, the accused was charged with the murder of a tenant farmer, his wife and small child, it being contended that the accused thereafter burned the house with the bodies in it to conceal the crime. A pan containing the victims' bones was placed in his lap during the questioning which resulted in one confession. This confession was not sought to be introduced against him, but later that day, he was taken to the state prison where another confession was obtained which was admitted. In holding that this misconduct on the part of the officers did not invalidate the second confession, the Court said:

> "The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at the trial of his subsequent confessions under all possible circumstances.

> The admissibility of the later confession depends upon the same test—is it voluntary. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process" (322 U. S. at 603).

Also pertinent to the facts here, in that petitioner was removed to entirely different surroundings before the questioned confession was obtained, is the language of this Court, viz.:

> "It followed the prisoner's transfer from the control of the sheriff's force to that of the warden's. One person who had been present during a part of the time while the Hugo interrogation was in progress was present at McAlester, it is true, but he was not among those charged with abusing Lyons during the questioning at Hugo" (322 U. S. at 604).

In **Lisenba v. California**, supra, the accused, while in custody on Monday, was slapped by an officer. He confessed the following day. It was held that use of the confession was not a denial of due process under these circumstances (314 U. S. at 240).

In view of the circumstances here—the lack of anything to connect what transpired in the doctor's office with the confession made several hours later—coupled with the testimony of the accused at the trial to the effect that he was not scared or afraid (R. 127-144) it is clear that the admission of the written confession (R. 226), and the peti-

tioner's confirmation of it several days later (R. 238) did not amount to a "failure to observe that fundamental fairness essential to the very concept of justice". **Lisenba v. California,** supra (314 U. S. at 236).

D. **The Decision Below Does Not Violate Petitioner's Sixth Amendment Right to Counsel under Escobedo v. Illinois, 378 U. S. 478, 12 L. Ed. 2d 977 (1964).**

In **Escobedo,** the crucial facts were (1) that the accused was never advised of his right to counsel, and (2) he specifically requested counsel which request was denied.

Here, petitioner was fully advised as to his rights (R. 97, 99, 120, 220, 224), and he expressly declared that he did not desire an attorney (R. 100, 120, 224).

What was done here came very close to complying with the requirements of **Miranda v. Arizona,** 384 U. S. 436, 16 L. Ed. 2d 694 (1966), although that case is not applicable here. **Johnson v. New Jersey,** 384 U. S. 719, 16 L. Ed. 2d 882 (1966).

> "The mere fact that a confession was made while in the custody of the police does not render it inadmissible."
>
> **McNabb v. United States,** 318 U. S. 332, 346, 87 L. Ed. 819 (1943).

> "And certainly we do not mean to suggest that all interrogation of witnesses and suspects is impermissible."
>
> **Haynes v. Washington,** 373 U. S. 503, 515, 10 L. Ed. 2d 513 (1963).

And, in **Miranda v. Arizona,** supra, it was said:

> "An express statement that the individual is willing to make a statement and does not want an attorney

followed closely by a statement could constitute a waiver." 16 L. Ed. 2d at 724.

• • •

"Confessions remain a proper element in law enforcement" • • •

"Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today" (16 L. Ed. 2d at 726).

The Court of Appeals for the District of Columbia has construed Escobedo contrary to that as contended for by petitioner. See **Jackson v. United States**, 337 F. 2d 136, 140-141 (C. A. D. C. 1964), cert den. 380 U. S. 935, 13 L. Ed. 2d 822 (1965); **Long v. United States**, 338 F. 2d 549 (C. A. D. C. 1964). In the **Jackson case**, it was said:

"We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F. B. I., the police and the United States Commissioner acting pursuant to Rule 40 (b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us."

In **Massiah v. United States**, 377 U. S. 201, 12 L. Ed. 2d 246 (1964), a federal prosecution subject to the Sixth Amendment, reliance was placed on the fact that Massiah was tricked, viz.:

"In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent" (377 U. S. at 206).

It was further said:

> "Here we deal not with a State Court conviction but with a federal case, where the specific guarantee of the Sixth Amendment directly applies" (377 U. S. at 205).

II.

There Was No Denial of Equal Protection by the Rulings Below Relating to the Challenges to the Grand and Petit Juries.

The procedure of jury selection in Georgia as set forth in the Brief of Petitioner (p. 47) is essentially correct, except that the jury commissioners select a number of grand jurors from the persons previously selected as traverse jurors in a number not to exceed two-fifths of those selected as traverse (petit) jurors. In other words, the two-fifth's figure is applied to the traverse jurors in selecting the grand jurors, and not to the tax digests in selecting either, as Petitioner's brief indicates. **Pollard v. State**, 148 Ga. 447 (3), 96 S. E. 997 (1918). It should also be emphasized that the actual selection of the venires for each term of court is accomplished by the drawing of tickets containing the names of jurors from the jury boxes, Code §§ 59-203, 59-701. The making up of the panels has nothing to do with the "jury lists", which are merely a recording on the minutes of the Court of the names in the jury boxes. Code § 59-109.

Petitioner contends (A) That the state courts erred in denying him the right to adduce evidence relating to the composition of jury lists in existence prior to the revision in the summer of 1964. (B) That the selection of the jury lists from the tax digest, required by law at this time to list Negro and white taxpayers separately, Code § 92-6307, constitutes a denial of equal protection, and (C) That the disproportion between the number of Negroes

on the tax digest and the number on the grand and petit juries in this case established a prima facie case of discrimination.

A. No Error Results From the Action of the Georgia Courts in Restricting Proof to the Current Jury Lists.

In support of the Plea in Abatement to the indictment (R. 3) and the challenge to the array of traverse jurors (R. 6-8) both based upon alleged racial discrimination in jury selection, counsel for petitioner sought to introduce grand jury lists for previous years, to wit, 1954, 1956, 1958, 1959, 1960, 1962, 1963 (R. 72-3) and traverse jury lists for the years 1954, 1958, 1960, 1961, 1963, and 1965 (R. 73). Objection was made to the lists for prior years on the ground that only the jury lists from which the juries in this case were drawn would be relevant (R. 70, 73). Ruling was initially reserved (R. 72), but subsequently, the Court sustained the objection and ruled out all jury lists other than the 1965 lists from which the grand and traverse juries in this case were selected (R. 147). However, the Court accepted these lists by way of offer of proof (R. 254-298).

However, petitioner made no further offer of proof. Since the burden is on petitioner to prove discrimination, **Akins v. Texas**, 325 U. S. 398, 89 L. Ed. 1692 (1945); **Swain v. Alabama**, 380 U. S. 202, 226, 13 L. Ed. 2d 759 (1965); **Fay v. New York**, 332 U. S. 261, 285, 91 L. Ed. 2043 (1947), it is impossible to tell whether or not there was any discrimination with respect to these prior lists, and hence petitioner failed to carry the burden.

However, regardless of this, respondent submits that even assuming a more complete offer of proof had been made, and even assuming that such evidence would have made out a prima facie case of discrimination, the evidence as to the 1965 jury lists sufficiently rebuts any inference of discrimination.

It plainly appears that the jury boxes were revised in the summer of 1964 (R. 76).[1] "Former errors can not invalidate future trials". . . . It is this particular box that is decisive. **Brown v. Allen**, 344 U. S. 443, 479, 97 L. Ed. 469 (1953). What transpired previously is irrelevant. **Cassell v. Texas**, 339 U. S. 282, 94 L. Ed. 839 (1950). As the population of the County is very small—only 5313 (R. 75)—some member of the Board of Jury Commissioners was personally familiar with every Negro taxpayer in the County (R. 78, 84-5, 87). For the year 1963, there were 1548 white taxpayers and 411 Negro taxpayers in the County—approximately 20% (R. 74). According to the 1960 Census, there were a total of 2656 persons over 21 years, of which only 728 were Negro (R. 75). For the October Term, 1965, at which petitioner was tried, there was one Negro on the Grand jury (R. 86) and at least 4 Negroes on the petit jury list from which the jury trying petitioner was selected (R. 321).[2] Of the 691 non-white persons in Charlton County 25 years of age or older, 302 were functionally illiterate.[3] "[T]here comes a point where this Court should not be ignorant as judges of what we know as men," **Watts v. Indiana**, 338 U. S. 49, 52, 93 L. Ed. 1801 (1949), and "We recognize the fact that these lists have a higher proportion of white citizens than of colored, doubtless due to inequality of educational and economic opportunities." **Brown v.**

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[1] Actually, the revision took place on Sept. 3, 1964, according to the minutes of Court.

[2] The Clerk of Charlton Superior Court advises that there were a total of 479 names on the 1964 traverse jury list, of which he is able to recognize at least 58 as being Negroes; and that on the 1964 grand jury list, there are a total of 147 names, of which at least 11 are Negroes. Of the 99 jurors summoned for traverse jury service at the 1964 October Term, 9 Negroes actually appeared for service.

[3] See United States Census of Population 1960, Georgia, General Social and Economic Characteristics, PC (1) 12 c Ga., p. 334.

Allen, 344 U. S. 443, 473, 97 L. Ed. 469 (1953), and see **Swain v. Alabama**, supra (380 U. S. at 208). To attempt to apply statistical formulas, such as petitioner suggests (Brief p. 58) which assume a complete equality of intelligence, education and other qualities necessary for jury service between the races, in a small rural, agricultural county like Charlton, is not only erroneous, it is absurd. There was no effort here to prove that any large number of Negro taxpayers were qualified for jury service.

In **Swain v. Alabama**, supra, only two Negroes were on the grand jury indicting the accused, and eight were on the panel from which the petit jury was selected, and two of these were exempt. In holding that this did not make out a case of discrimination, this Court said:

> "It is wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels, as was the case in **Norris v. Alabama**, 294 U. S. 587; **Hill v. Texas**, 316 U. S. 400; **Patton v. Mississippi**, 332 U. S. 463; **Hernandez v. Texas**, 347 U. S. 475; and **Reece v. Georgia**, 350 U. S. 85. Moreover, we do not consider an average of six to eight Negroes on these panels as constituting forbidden token inclusion within the meaning of the cases in this Court. **Thomas v. Texas**, 212 U. S. 278; **Akins v. Texas**, 325 U. S. 398; **Avery v. Georgia**, 345 U. S. 559. Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment."

In **Brown v. Allen**, 344 U. S. 443, 97 L. Ed. 469 (1953), a challenge was overruled where there was only one Negro who served on the grand jury, and eight on the panel from which the petit jury was selected. See also, **Billingsley v. Clayton**, 359 F. 2d 13 (C. A. 5th, 1966).

While token inclusion does not satisfy the Constitution, **Brown v. Allen**, 344 U. S. 443, 471, 97 L. Ed. 469 (1953);

Smith v. Texas, 311 U. S. 128, 130, 85 L. Ed. 84 (1940); **Billingsley v. Clayton**, 359 F. 2d 13 (C. A. 5th, 1966), the mere fact that there are no Negroes on the grand or petit jury in a given case does not establish discrimination, **Virginia v. Rives**, 100 U. S. 313, 25 L. Ed. 667 (1880); **Bush v. Kentucky**, 107 U. S. 110, 117, 27 L. Ed. 354 (1883); **Martin v. Texas**, 200 U. S. 316, 320, 50 L. Ed. 497 (1906); **Akins v. Texas**, supra (325 U. S. at 403); **Hoyt v. Florida**, 368 U. S. 57, 7 L. Ed. 2d (1961); **Fay v. New York**, 332 U. S. 261, 285, 91 L. Ed. 2043 (1947), for "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury." **Hoyt v. Florida**, supra. An accused is not entitled to demand proportional representation of his race on the jury in his case. **Thomas v. Texas**, 212 U. S. 278, 53 L. Ed. 512 (1909); **Akins v. Texas**, supra; **Swain v. Alabama**, supra (380 U. S. at 208); **Fay v. New York**, supra (332 U. S. at 291); **Cassell v. Texas**, 339 U. S. 282, 291, 94 L. Ed. 839 (1950); **United States ex rel. Goldsby v. Harpole**, 263 F. 2d 71 (C. A. 5th, 1959), cert. den. 361 U. S. 838; **United States ex rel. Seals v. Wiman**, 304 F. 2d 53 (C. A. 4th, 1962), cert. den. 372 U. S. 924; **Scott v. Walker**, 358 F. 2d 56 (C. A. 5th, 1966); **Billingsley v. Clayton**, 359 F. 2d 13 (C. A. 5th, 1966). Indeed, he is not even entitled to demand that any member of his race serve. **Strauder v. West Virginia**, 100 U. S. 303, 305, 25 L. Ed. 664 (1880); **Virginia v. Rives**, 100 U. S. 313, 25 L. Ed. 667 (1880); **Neal v. Delaware**, 103 U. S. 370, 26 L. Ed. 567 (1881); **Bush v. Kentucky**, supra; **Wood v. Brush**, 140 U. S. 278, 285, 35 L. Ed. 505 (1891); **Jugiro v. Brush**, 140 U. S. 291, 297, 35 L. Ed. 510 (1891); **Akins v. Texas**, supra.

B. **The Use by the Jury Commissioners of the Tax Digest, Required by Law to List Negro Taxpayers Separately, Shows No Violation of the Constitution.**

Georgia law requires that jurors be selected from the books of the tax receiver. Code § 59-106. In this case,

the jury commissioners utilized the tax digests, as distinguished from the individual tax return sheets[4] (R. 77).

Prior to 1966, Code § 92-6307 provided in part:

> "Names of colored and white taxpayers shall be made out separately on the tax digest."

This provision was repealed in 1966 (Ga. Laws 1966, Vol. I, p. 393).

When the jury boxes in question in this case were prepared, however, the tax digests were kept separate, and it is this fact, coupled with the requirement that the jury lists be made from the tax records, that petitioner assails as being unconstitutional, relying upon **Avery v. Georgia**, 345 U. S. 559, 97 L. Ed. 1244 (1953).

A similar contention was rejected in **Maxwell v. Stevens**, 348 F. 2d 325 (C. A. 8th, 1965); **Harris v. Stephens**, 361 F. 2d 888, 892 (C. A. 8th, 1966); and **Brookins v. State**, 221 Ga. 181, 144 S. E. 2d 83 (1965).

The validity of Code § 92-6307 if attacked in a direct proceeding by way of injunction is not at issue here. See **Anderson v. Martin**, 375 U. S. 833, 11 L. Ed. 2d 439 (1964); **Hamm v. Virginia State Board of Elections**, 230 F. Supp. 156 (D. C. Va. 1964), aff'd sub nom. **Tancil v. Woolls**, 379 U. S. 19, 13 L. Ed. 2d 91 (1964). The question is whether under the facts of this case, the practice is seen to be harmful, for harmless error is no ground for complaint. Cf. Rule 61, Fed. Rules Civ. Proc.

In **Avery v. Georgia**, supra, and in **Williams v. Georgia**, 349 U. S. 375, 99 L. Ed. 1161 (1955), this Court held that

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[4] Prior to 1965, the tax return sheets furnished by the State Revenue Department (Code § 92-6302) to all counties were yellow for Negro taxpayers and white for white taxpayers (R. 78). However, this practice was discontinued in 1965, and in any event, since the tax return sheets were not used in this case, this is constitutionally irrelevant.

the placing of the names of white and Negro jurors in the jury box on different colored slips of paper was such error as would require a new trial, where seasonably challenged, on the reasoning that,

> "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process. And, in view of the case before us, where not a single Negro was selected to serve on a panel of sixty—though many were available, we think that petitioner has certainly established a prima facie case of discrimination." **Avery v. Georgia,** supra (345 U. S. at 562).

The determinative factor in **Avery** is the **crucial stage** at which the different colored slips afforded an opportunity for discrimination. The slips are placed in the box to serve the function of affording a fair and impartial means of selecting the venires through the chance drawing of names for each term of court. This procedure by its nature is designed to be so conducted as to eliminate the element of conscious choice in the selection process. It takes place at the critical point when each panel for the coming term of court is in the actual process of being made up. Any distinguishing marks therefore tend to destroy the very element of chance which the drawing of names from a box is designed to achieve. As pointed out by Mr. Justice Frankfurter's concurring opinion in **Avery,** the openings in the jury boxes were of sufficient size to enable the judge drawing the slips to distinguish their color. 345 U. S. at 564. In other words, the different colored slips injected "color" where it was peculiarly important that the selection process be color blind.

Such is not the case here, for the difference is between selecting the jury rolls, and selecting the venires. With

respect to the former, involved in this case, the decisions of this Court place an affirmative duty on jury commissioners to consider race, for in no other way can they be sure that the jury consists of a cross-section of the community:

> "What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them." **Smith v. Texas**, 311 U. S. 128, 132, 85 L. Ed. 84 (1940).

And, in **Hill v. Texas**, 316 U. S. 400, 404, 86 L. Ed. 1559 (1942), this Court declared that it was the duty of jury commissioners imposed by Section 4 of the Civil Rights Act of 1875, to make an "effort to ascertain whether there were within the County members of the colored race qualified to serve as jurors, and if so, who they were." In **Cassell v. Texas**, 339 U. S. 282, 94 L. Ed. 839 (1950), convictions were reversed because of failure of the jury commissioners to acquaint themselves with Negroes in the County in order to ascertain their qualifications. See also **Eubanks v. Louisiana**, 356 U. S. 584, 2 L. Ed. 2d 991 (1958); and **United States ex rel. Seals v. Wiman**, 304 F. 2d 53 (C. A. 5th 1962), cert. den. 372 U. S. 924 (1963).

See also, **Woods v. State**, 222 Ga. 321, ... S. E. 2d ... (1966).

Just recently, the Fifth Circuit alluded to this fact in **Brooks v. Beto**, ... F. 2d ..., 35 L. W. 2077 (July 29, 1966), where it was said that "How then can it be said that conscientiously to do what the Constitution demands makes the result bad because race had been consciously considered to assure that race has not been the basis of discrimination?"

Moreover, any racial differentiation appearing on the tax digests would not give the jury commissioners any information they did not already have. While the process of drawing the venires from the box is intended to be rapid, routine, indiscriminate, and completely without regard to the identity of individuals, the making up of the jury lists is something entirely different. The former is purely a mechanical, impersonal operation. The latter is personal and deliberative. Georgia law imposes certain qualifications for jury service, such as that the juror be "experienced, intelligent and upright," Code § 59-106, and that grand jurors be "above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent and upright persons . . ." Code § 59-201.

For the jury commissioners to perform their duty in ascertaining these qualifications, they necessarily must either personally know or investigate each prospective juror, and in so doing, it is inevitable that they would either know or discover his racial identity. Moreover, in a county as small as Charlton, it is unlikely that the commissioners would not already know the racial identity of each citizen. Two jury commissioners testified that they knew all of the Negroes in their sections of the county (R. 78, 81-2, 87).

In the present case, there is no evidence to indicate that the separate tax digests actually encouraged any discrimination, nor had any reasonable tendency to do so. Nor is there anything to indicate that the statute requiring separate digests, Code § 92-6307, was ever intended to have this effect. Georgia law had long required that the names of jurors be taken from the county tax books, a not uncommon provision in many states. See Code of Georgia of 1882, § 3910 (b). It was not until 1894 that the predecessor of Code § 92-6307 was enacted, with pas-

sage that year of a brief act limited to this section only (Ga. Laws 1894, p. 31).

The legislative background of the Act of 1894 discloses that it was not designed to serve a discriminatory purpose. The 1890's were times of great political unrest in Georgia. The Populist Movement was sweeping the country and threatening to divide the Democratic Party. At this time, no provision was made by law for the registration of voters, persons could vote at any election box in the county, often voted at more than one, and at the elections held in 1892, fraud was rampant on both sides. As one historian stated:

> "This election throughout the state was a pathetic example of the venality that too often accompanies the rule by the people. Negro voters were bought and sold like merchandise and herded around the polls like so many cattle. They were fed at barbecues and made drunk and penned up to prevent them from voting, if they could not be otherwise controlled. Most of them who voted were in the hands of the regular Democrats." Coulter, **Georgia, A Short History**, p. 393 (1947).

Another commentator elaborates even further:

> "Many of the planters, owners of turpentine stills, and other employers took their 'hands' to the polls and voted them in gangs. In some of the towns and cities, all-night revelries were held for the darkies on the night before election. Barbecue was served with whiskey and beer by the barrel. Next morning the dusky revelers were marched to the polls by beat of drums, carefully guarded lest some desert in search of another reward. In some of the cities bands of them were taken from one polling place to another and voted under different names. According to the testimony produced in the Watson-Black contested election case,

> Negroes were brought over from South Carolina in four-horse wagons and voted at various precincts in Augusta. The total vote in that city was double the number of legal voters, eighty per cent of it being Democratic. Somewhat similar methods were employed in the smaller towns. In the country, a considerable number of Populist precincts were thrown out on technicalities. The Democrats were not the only sinners, to be sure; but they were more resourceful, and hence more successful at the game." Alex Mathews Arnett, "The Populist Movement in Georgia", 7 Ga. Hist. Quart. 313, 332 (1923).

The immediate reaction was a demand for election reform. In his "State of the State" address to the 1894 General Assembly, Governor Northen called for a voter's registration law. House Jour. 1894, p. 42. Throughout the months of October and November, 1894, the **Atlanta Constitution** called for an election bill to insure that only qualified persons would be able to vote. See, e. g., issue of Sunday, November 4, p. 18. On November 6, 1894, an election was held at which widespread charges of vote frauds were again reported on both sides in connection with the Tenth District Congressional race in which Tom Watson lost his seat. See **Atlanta Constitution,** November 8, 1894, at p. 4; Id., issue of November 9, p. 4.

The result was passage of Georgia's first registration law (Ga. Laws 1894, p. 115). This Act was designed to insure (1) That only persons duly qualified by registration would be permitted to vote, and (2) That a voter would be permitted to vote only in the district of his residence. Throughout the Act, emphasis was placed on requirements which would enable the responsible officials to properly identify persons claiming a right to register to vote. Conversant with the particular problems previously experienced with Negro voters, the registration act required identification by race, but it should be noted

that the act imposed only purely objective requirements, the literacy requirement not appearing in the law until 14 years later in 1908 (Ga. Laws 1908, p. 27). Undoubtedly, the identification requirement was made necessary by the fact that traditionally many Negroes were named in honor of their former masters, and after emancipation, their employers.

Under the Constitution in existence at this time, only those persons who had paid all taxes[5] due the state and county were permitted to vote (Const. of 1877, Art. II, Par. II; **McElreath on the Constitution of Georgia,** § 854), and in order to facilitate identification of taxpayers from the tax records during the registration process, House Bill 141, which later became § 92-6307, was introduced in the House of Representatives by Representative Rawlings on November 14, 1894 (House J. 1894, p. 230). The Atlanta Constitution of Thursday, November 15, 1894, at p. 7, reported the introduction of this bill as part of a story headed "Registration and Elections," which, after referring to the progress of the Voters' Registration Bill, stated:

> "Another bill bearing upon qualifications of voters is by Mr. Rawlings of Washington. He provides that it shall be the duty of the tax receivers of the several counties to place the names of the colored taxpayers in each militia district upon the tax digest in alphabetical order and it is provided that the names of the colored and white taxpayers shall be made out separately on the tax digest.
>
> 'The occasion for that bill,' said Mr. Rawlings, 'is simply this: Under the present law there is no requirement of this kind and the tax receivers are in the habit of placing the names of the Negro taxpayers

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[5] This related only to ad valorem taxes. The poll tax was not enacted until 1927 (Ga. Laws 1927, p. 57; Code of 1933, § 92-108).

with those of the whites and it is impossible to find out with any degree of ease whether a Negro's name is on the tax digest. You see, it is pretty necessary to know this in election times. This is due to the habit of placing a man's Negro employees with his name on the tax digest. For instance, Mr. Smith's property is returned and with his name is placed the names of the Negroes who work for him and whose names he gives in. My bill provides for separate lists of colored and white taxpayers and that each list shall be kept alphabetically.' "

The foregoing demonstrates that Code § 92-6307 was never designed as a means of encouraging or facilitating discrimination. It was but part of a voters' registration effort aimed at preventing vote frauds through voting by unauthorized persons. It could very easily serve the same function today, for many Negro citizens bear the same names as white citizens of their area. Notwithstanding, the General Assembly repealed this part of the law this year (Ga. Laws 1966, p. 393).

Respondent deems it also important to point out to the Court the effect of any such ruling as urged here. Under the rulings by the Fifth Circuit in **United States ex rel. Goldsby v. Harpole**, 263 F. 2d 71 (C. A. 5th 1964), and particularly the decision in this case, 333 F. 2d 496, it is virtually impossible for this issue to be waived, when challenged by federal habeas corpus. There are 4896 Negroes now confined in the Georgia prison system. If petitioner prevails on this question, every one of these prisoners will have to be retried. Such chaos should not be countenanced.

(C) **There Was No Prima Facie Showing of Discrimination From the Statistics.**

This contention was previously argued in Part A, supra.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 251.—October Term, 1966.

Isaac Sims, Jr., Petitioner, v. State of Georgia.	On Writ of Certiorari to the Supreme Court of the State of Georgia.

[January 23, 1967.]

Mr. Justice Clark delivered the opinion of the Court.

Petitioner, a Negro, has been convicted of raping a white woman and has been given the death penalty. He raises five federal questions [1] for consideration by this

[1] The five questions are:

"1. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently coercive circumstances within the doctrine of *Fikes* v. *Alabama*, 352 U. S. 191.

"2. Whether petitioner's Fourteenth Amendment rights were violated by the failure of the Georgia courts to afford a fair and reliable procedure for determining the voluntariness of his alleged coerced confession in disregard of the principle of *Jackson* v. *Denno*, 378 U. S. 368.

"3. Whether petitioner's Fourteenth Amendment right to counsel as declared in *Escobedo* v. *Illinois*, 378 U. S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

"4. Is a conviction constitutional where:

"(a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;

"(b) the number of Negroes chosen is only 5% of the jurors but they comprise about 20% of the taxpayers; and

"(c) a Negro criminal defendant's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years is disallowed?

"5. Where a Negro defendants sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in

Court, among which is that his Fourteenth Amendment rights to a fair trial were violated by the state trial judge's failure to determine the voluntariness of his alleged confession prior to its admission into evidence before the jury, as required by the rule in *Jackson* v. *Denno*, 378 U. S. 368 (1964). The Supreme Court of Georgia ruled that *Jackson* was not applicable and affirmed petitioner's conviction, *Sims* v. *State*, 221 Ga. 190, 144 S. E. 2d 103. We granted certiorari limited to the five questions, 384 U. S. 998. We have determined that petitioner's case is controlled by *Jackson*, *supra*, and therefore we do not reach any of the other issues raised.

I.

The record indicates that on April 13, 1963, a 29-year-old white woman was driving home alone in her automobile when petitioner drove up behind her in his car, forced her off the road into a ditch, took the woman from her car into nearby woods and forcibly raped her. When he returned to his car, he could not start the engine so he left the scene on foot. Some four hours later he was apprehended by some Negro workers who had been alerted to be on the watch for him. He told these Negroes that he had attacked a white woman. They then turned petitioner over to their employer who delivered him to two state patrolmen. He was then taken to the office of a Doctor Jackson who had previously examined the victim. Petitioner's clothing was removed in order to test it for blood stains. Petitioner testified that while he was in Doctor Jackson's office he was knocked down, kicked over the right eye and pulled around the floor by his private parts. He was taken

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an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?"

to a hospital owned by Doctor Jackson, which was adjacent to his office, where four stitches were taken in his forehead. Thereafter the patrolmen took petitioner to Waycross, Georgia, some 30 miles distant, where he was placed in the county jail. During that evening, he saw a deputy sheriff whom he had known for some 13 years and who was on duty on the same floor of the jail where petitioner was incarcerated. He agreed to make a statement and was taken to an interview room where, in the presence of the Sheriff, the Deputy Sheriff and two police officers, he signed a written confession. Two days later he was arraigned.

Prior to trial petitioner filed a motion to suppress the confession as being the result of coercion. A hearing was held before the court out of the presence of the jury. The sheriff and the deputy testified to the circumstances surrounding the taking and signing of the confession. Petitioner testified as to the abuse he had received while in Doctor Jackson's office. He testified that he "felt pretty rough for about two or three weeks [after the incident], more on my private than I did on my face" and that he "was paining a right smart." There was no contradictory testimony taken. The court denied the motion to suppress without opinion or findings and the confession was admitted into evidence at petitioner's trial.

At the trial, Doctor Jackson was a witness for the state. On cross-examination he denied that he had knocked petitioner down while the latter was in his office, or that he had kicked him in the forehead but made no mention of the other abuse about which petitioner testified. The doctor stated that petitioner was not abused in his presence but he refused to say whether the patrolmen present abused petitioner as he

was not in the office at all times while the petitioner was there with the patrolmen. In this state of the record petitioner's testimony in this regard was left uncontradicted.

II.

There is no actual ruling or finding in the record showing that the trial judge determined the voluntariness of the confession. Although he admitted it into evidence, it appears that he was only following a long-standing state practice that the "State having made out a prima facie case that the alleged confession was freely and voluntarily made, it was a question for the jury to determine on conflicting evidence whether the alleged confession was freely and voluntarily made." *Downs* v. *State*, 208 Ga. 619, 68 S. E. 2d 568. Defense counsel called the court's attention to the *Jackson v. Denno* ruling of this Court and stated that he did not "know whether the procedure being followed at this time satisfies the rule decided by the Supreme Court on June 22nd, 1964, that the Court must make judicial determination whether the statement was made voluntarily before it is read to the jury." In his charge to the jury the judge directed that it was for the jury to determine whether the confession was actually made or not and to disregard it if not made freely and voluntarily.

III.

On appeal to the Supreme Court of Georgia, it was held proper for the trial judge to have left the question of the voluntariness of the confession to the jury with instructions that they should disregard it if they should determine that it was not, in fact, voluntarily made. Indeed, that court specifically found that the "related facts made a prima facie showing that the statement was freely and voluntarily made and admissible in evidence." 221 Ga., at 198, 144 S. E. 2d, at 110. It there-

fore seems clear from the opinion of the highest court of Georgia that it has applied its own rule rather than follow the rule set down in *Jackson* for the procedural determination of the voluntariness of a confession. This conclusion is buttressed by the fact that the court below also found that the "Georgia rule presents the question to the jury without giving them the judgment of the judge." *Id.*, at 200, 144 S. E. 2d, at 111. This is the exact procedural device which is proscribed by the rule in *Jackson*.

IV.

The Supreme Court of Georgia reasoned, however, that *Jackson* was not applicable because of the safeguards that Georgia's laws erect around the use of confessions. It pointed out that under Georgia law, before a confession may be admitted it must be corroborated and a showing made that it was freely and voluntarily given. In addition, the trial judge has the power to set aside the verdict of the jury and grant a new trial if, in his opinion, the jury was in error. The court concluded that the rule in *Jackson* is satisfied by Georgia law and that "It would be difficult to find a more complete satisfaction of the requirement of Jackson than Georgia provides." *Id.*, at 200, 144 S. E. 2d, at 111. The court also felt that if this not be true, in any event, "the unsound implications of Jackson should not be extended one iota to make it cover cases not explicitly covered by it such as this case where there was no evidence to make any issue of voluntariness. Without an issue there is nothing to try." We cannot agree. There was a definite, clear-cut issue here. Petitioner testified that Doctor Jackson physically abused him while he was in his office and that he was suffering from that abuse when he made the statement, thereby rendering such confession involuntary and the result of coercion. The doctor admitted that he saw petitioner on the floor of

his office; that he helped him disrobe and that he knew that petitioner required hospital treatment because of the laceration over his eye but he denied that petitioner was actually abused in his presence. He was unable to state, however, that the state patrolmen did not commit the alleged offenses against petitioner's person because he was not in the room during the entire time in which the petitioner and the patrolmen were there. In fact, the doctor was quite evasive in his testimony and none of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers and was in conflict with the testimony of the physician. Under *Jackson*, it was for the trial judge to first decide these conflicts and discrepancies. This he failed to do.

Furthermore, Georgia's highest court, in finding that its rule satisfied the requirements of *Jackson*, overlooks the fact that the same safeguards offered by the Georgia practice, were present in the procedures of New York in *Jackson* and were rejected by this Court. A constitutional rule was laid down in that case that a jury is not to hear of a confession unless and until the trial judge has determined that it was freely and voluntarily given. The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity. Here there has been absolutely no ruling on that issue and it is therefore impossible to know whether the judge thought the confession voluntary or if the jury considered it as such in their determination of guilt. *Jackson*, having been decided June 22, 1964, was binding on the courts of

Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed.

The judgment is, therefore, reversed and cause is remanded for a hearing as provided by *Jackson* v. *Denno*, *supra*, at 393–396.[2]

It is so ordered.

MR. JUSTICE BLACK dissents for the reasons stated in his dissent in *Jackson* v. *Denno*, 378 U. S., at 401.

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[2] This disposition is in keeping with the teaching of *Jackson*, *supra*, that "a determination of voluntariness" should occur initially "in the state courts in accordance with valid state procedures . . . before this Court considers the case on direct review or a petition for habeas corpus is filed in a Federal District Court." 378 U. S., at 393.